

Constitution-making in Libya after the fall of Gaddafi: the role of national bodies and transnational actors

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Abstract

Ten years after the fall of Gaddafi's regime, Libya still has not adopted a permanent constitution. Over the last decade, both national bodies and transnational actors have taken part in constitution-making; however, all efforts have been unsuccessful so far. While the scholarship on post-2011 Libya has mainly focused on the impact of local events and national actors on this process, this essay outlines the recent history of Libya's constitution-making by stressing the intermingling of the activities of local bodies and transnational actors. By using the theoretical lens of transnational legal orders (TLOs), it claims that two TLOs – the Western liberal democratic TLO and the Islamic one - will coexist if the 2017 draft constitution is adopted. Nevertheless, both TLOs would be necessary to reinforce the legitimacy of the constitution before, on the one hand, international organisations and Western countries and the Libyan population, on the other.

Keywords: Libya – Arab Uprisings – Constitution-making – 2017 Draft Constitution – Transnational actors.

SUMMARY: 1. Introduction. 2. Libyan constitutional history before the Arab Uprisings. 3. The establishment of the National Transitional Council and the adoption of the 2011 Interim Constitutional Declaration. 4. From a national to a transnational constitution-making: towards the Libyan Political Agreement. 5. Local tentative efforts: the Constitutional Drafting Assembly's draft constitutions of 2015, 2016 and 2017. 6. From 2017 to present: a new phase of transnational constitution-making. 7. Conclusion.

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1. Introduction

Over the last decade, Libya has been experiencing several efforts to adopt a new constitution. These endeavours have largely developed within a transnational framework and have gone hand in hand with the attempts to make a compromise between several political actors and militias that have emerged from the civil war. The necessity to reach this result has been clear also in the words of Mahmoud Jibril, the chairman of the National Transitional Council (NTC) and *de facto* head of state after the outbreak of the Libyan uprising. He stated that «the moment we draft a constitution, then there is a frame of reference»¹. However, the path towards the development of this frame of reference has been arduous and has not led to any permanent constitution yet.

Therefore, this contribution will outline the recent history of Libya's constitution-making by describing the activities of both national bodies and transnational actors after the fall of Gaddafi. Historically, but more clearly over the last decades and in conjunction with conflicts, constitution-making has been increasingly characterised by the interaction of local parties with transnational actors². This interaction has been particularly clear in the Libyan context.

However, the scholarship on post-2011 Libya's constitution-making has so far mainly focused on the impact of Libyan actors and local events on this process. Johnson wrote about Libya's «conflict constitution-making», assessing the impact of the civil war on constitution-making processes³. Similarly, van Lier concentrated on the local level, giving an interesting contribution relating to the activities of the Constitutional Drafting Assembly (CDA) and holding Libya as an example of the unlikelihood of solving conflicts through the redistribution of power and resources or the adoption of a constitution in a context with a high social conflict and a deeply divided political landscape⁴.

Additionally, the works of Geha and Volpi, Sawani and Pack, Schnelzer, and Baldinetti directed the attention towards the Libyan society. Geha and Volpi focused on the constitutional dialogues led by the Forum for Democratic Libya between February and March 2013 and argued that the existence of ideational and practical continuities with previous political practices impacted on the emergence of new forms of effective civic activism. Thus, its integration in debates about the constitution resulted in an arduous task⁵. Sawani and Pack illustrated how different

¹ N. Schnelzer, *Libya in the Arab Spring. The Constitutional Discourse since the Fall of Gaddafi*, Springer, 2016, 55.

² *Ibidem*; J. Yeh, W. Chang, *The Emergence of Transnational Constitutionalism: Its Features, Challenges and Solutions*, in *Penn State International Law Review*, No. 1, 2009, 91.

³ D.E.W. Johnson, *Conflict Constitution-making in Libya and Yemen*, in *University of Pennsylvania Journal of International Law*, No. 2, 2017, 298.

⁴ F.A. van Lier, *Constitution-making as a Tool for State-Building? Insights From an Ethnographic Analysis of the Libyan Constitution-Making Process*, Max Planck Institute for Social Anthropology, Working Paper No. 192, 2018, 18.

⁵ C. Geha, F. Volpi, *Constitutionalism and Political Order in Libya 2011-2014: Three Myths about the Past and a New Constitution*, in *The Journal of North African Studies*, No. 4, 2016, 702.

groups – namely the Islamists, the federalists and Amazigh – contested the Interim Constitutional Declaration and how the National Transitional Council answered to their demands⁶. Similarly, Schnelzer's book focusing on the constitutional discourse is an important work to understand the positions of different Libyan actors⁷. Finally, Baldinetti examined the emergence of civil society groups that asked for the constitutional recognition of minority rights, as it was the case of the ethnic minorities Amazigh, Tebu and Tuareg⁸.

This paper aims at contributing to the existing scholarship on Libya's constitution-making by shifting the attention from a local to a transnational level. In doing so, I will adopt the theoretical framework of transnational legal orders (TLOs) to the study of constitutional norms of Ginsburg, Halliday and Shaffer⁹. Therefore, this essay will stress the relevance of the interplay of Libyan bodies and transnational actors – especially the UN, the EU, the Venice Commission and the Centre for Humanitarian Dialogue – in the ongoing constitution-building, and the consequent inevitable inclusion of local and transnational norms in the next Libyan constitution. As a result, inspired by the insightful studies by Thier on Afghanistan¹⁰ and Morrow on Iraq¹¹, this essay will contribute to the study of the recent constitution-making in Muslim-majority countries in transition. This field of research is particularly relevant to understand the interaction between two different and sometimes contrasting TLOs: the Western liberal democratic TLO and the Islamic TLO. This essay will conclude that this interaction will need to be at the basis of the next Libyan constitution in order to increase its legitimacy before Libyan and international actors.

2. Libyan constitutional history before the Arab Uprisings

Libya has existed as a country since 1929, when the regions of Cyrenaica, Fezzan and Tripolitania were united by Italy under one governor. However, after the Italian defeat in the Second World War, they were put under the administration of two of the winners of the conflict: Tripolitania and Cyrenaica came under the administration of Great Britain, while Fezzan was administered by France. It would take a few years until Libya was united again: in 1950 the British made Idris al-

⁶ Y. Sawani, J. Pack, *Libyan Constitutionality and Sovereignty Post-Qadhafi: the Islamist, Regionalist, and Amazigh Challenges*, in *The Journal of North African Studies*, No. 4, 2013.

⁷ N. Schnelzer, *Libya in the Arab Spring. The Constitutional Discourse since the Fall of Gaddafi*, cit.

⁸ A. Baldinetti, *Identità nazionale e riconoscimento delle minoranze in Libia: le richieste della società civile*, in E. Diodato, F. Guazzini (a cura di), *La guerra alle frontiere d'Europa: incognite e prospettive nel Mediterraneo*, Carocci, 2014, 113-116.

⁹ G. Shaffer, T. Ginsburg, T. Halliday (eds.), *Constitution-making and Transnational Legal Order*, Cambridge University Press, 2019, 6-7.

¹⁰ J.A. Thier, *Big Tent, Small Tent. The Making of a Constitution in Afghanistan*, in L. Miller, *Framing the State in Times of Transition*, United States Institute of Peace, 2010.

¹¹ J. Morrow, *Deconstituting Mesopotamia. Cutting a Deal on the Regionalization of Iraq*, in L. Miller, *Framing the State in Times of Transition*, United States Institute of Peace, 2010.

Senussi, leader of the Senussiyya brotherhood and supporter of Great Britain against the Axis, the king of the United Kingdom of Libya¹². The following year, a constitution, considered one of the most progressive of that time¹³, was adopted¹⁴.

The role of transnational actors was clear in the drafting process of the first Libyan constitution. In 1949, the UN Commissioner Pelt had arrived in the country and proved instrumental for the creation of a National Assembly thanks to a series of negotiations with the provinces¹⁵. At the end, despite the existence of divergent views among the three provinces, the National Assembly adopted a constitution in October 1951.

The preamble of the constitution established a union between the people of Cyrenaica, Tripolitania and Fezzan under King Idris al-Senussi. Under Chapter I, Libya was a hereditary monarchy and had a representative system of government (art. 2) and Islam was the religion of the State (art. 5). Chapter II was devoted to the rights of the people, stressing the equality of Libyans without distinction of religion, belief, race, language, wealth, kinship or political or social opinions (art. 11) and enlisting a series of rights and freedoms. Chapter III related to the federal government¹⁶. It distinguished between powers of the federal government (art. 36), joint powers (art. 38) and provincial powers for the subject matters not enlisted in the previous articles (art. 39).

The following chapters were devoted to the division of powers. The executive power was exercised by the king (art. 42), the legislative power by the king jointly with the parliament (art. 41), the judiciary power by the supreme court and the other tribunals (art. 43). The king also had the power to appoint the prime minister and the ministers by proposition of the prime minister (art. 78). The council of ministers had the responsibility to direct all international and external affairs of the State, according to the powers of the federal government established by the constitution (art. 84). The ministers were responsible before the Chamber of Representatives (art. 87), but not before the Senate, the chamber that represented the three provinces.

¹² See A.M. Morone, *Idris' Libya and the Role of Islam: International Confrontation and Social Transformation*, in *Oriente Moderno*, No. 97, 2017.

¹³ N. Schnelzer, *Libya in the Arab Spring. The Constitutional Discourse since the Fall of Gaddafi*, cit., 31-32.

¹⁴ See *Constitution du Royaume-Uni de Libye*, 7 October 1951, https://mjp.univperp.fr/constit/ly1951.htm#Chapitre_III.

¹⁵ See F. Cresti, M. Cricco, *Storia della Libia contemporanea*, Carocci, 2015, 144-146; D. Vandewalle, *A History of Modern Libya*, Cambridge University Press, 2012, 46; A.M. Morone, *Libyan Intermediaries on the Eve of Country Independence: The case of the Bin Sha'ban Family*, in A.M. Di Tolla, V. Schiattarella (eds.), *Libya between History and Revolution: Resilience, New Opportunities and Challenges for the Berbers*, UniorPress, 2020, 46.

¹⁶ Federalism reflected the interests of Cyrenaica and Fezzan, which feared a unitary government dominated by the more populated region of Tripolitania. Conversely, Tripolitania believed that the federal formula would leave the central government with little power. At the end, federalism prevailed. D. Vandewalle, *A History of Modern Libya*, cit., 47; A. Bensaâd, *Libya: The Dynamics of Fragmentation and the Circumvention of the (Re-)Construction of the State*, in *Afriche e Orienti*, No. 3, 2018, 48-49; *Draft of Libyan Constitution*, 31 August 1951, http://www.ajcarchives.org/AJC_DATA/Files/5A1.PDF, 3.

Chapter X focused on the dispositions concerning the provinces that should adopt their own organic law, provided that it was in accordance with the constitution. Finally, Chapters XI and XII stated that the official language was Arabic (art. 186), the United Kingdom of Libya had two capitals, Tripoli and Benghazi (art. 188), and the constitution could be revised with the exception of the dispositions concerning the monarchic regime, the succession to throne, the representative and parliamentary form of government and the principles of freedom and equality (art. 196-197).

As the federal form of government was not included among these dispositions, it was at the core of the Constitutional Amendment of 1963¹⁷. By the end of the 1950s the rapid economic growth due to the extraction of oil made it clear that federalism was too weak¹⁸, as the category of the joint powers enabled the provinces to prevent the development of national policies in crucial areas such as taxation and economic development¹⁹. Consequently, the federal system left the way to a unified state. The abolition of the federal formula represented «the single most critical political act during the monarchy's tenure in office»²⁰. Law No.1 of 1963 repealed the articles which dealt with the federal system: the government concentrated administrative, economic and planning powers at the central level and replaced the federal provinces with ten administrative units²¹. Oil revenues and company and individual taxation started being paid directly to the central government²².

However, at that time, despite the long list of rights of Chapter II of the constitution, normally associated with the liberal democratic TLO, Libya was far from being a democratic country. Political parties were banned, and the opposition suppressed. Politics was regulated by kinship ties, as King Idris relied on intermediaries to rule the country. He delegated the authority to power families, so that his legitimacy derived from «a network of tribal loyalty and affiliations»²³. This system increased the wealth of the monarchy thanks to alliances with tribal leaders to control trade routes but did not guarantee an equal distribution of the revenues of trade and oil to the entire population²⁴. By taking advantage from this situation, the military staged a coup on 1st September 1969, marking the end of the constitutional monarchy. A twelve-member Revolutionary Command Council was established and declared the birth of the Libyan Arab Republic with Colonel Muammar Gaddafi

¹⁷ See *Libya's Constitution of 1951 as Amended by Law No. 1 of 1963*, https://constitutionnet.org/sites/default/files/1951_-_libyan_constitution_english.pdf.

¹⁸ The Carter Center, *The 2014 Constitutional Drafting Assembly Elections in Libya – Final report*, 2014, https://www.cartercenter.org/resources/pdfs/news/peace_publications/election_reports/libya06112014-final-rpt.pdf, 9.

¹⁹ D. Vandewalle, *A History of Modern Libya*, cit., 48.

²⁰ *Idem*, 64.

²¹ N. Schnelzer, *Libya in the Arab Spring. The Constitutional Discourse since the Fall of Gaddafi*, cit., 32.

²² D. Vandewalle, *A History of Modern Libya*, cit., 64.

²³ N. Schnelzer, *Libya in the Arab Spring. The Constitutional Discourse since the Fall of Gaddafi*, cit., 32.

²⁴ *Idem*, 32- 33.

as Commander-in-Chief of the Armed Forces and *de facto* head of state. The previous constitution was abolished and substituted by a Constitutional Proclamation on 11th December 1969 until a new permanent constitution was drafted²⁵.

Under the 1969 Proclamation, Libya was an Arab, democratic and free republic in which sovereignty was vested in the people (art. 1). Islam was the religion of the state and Arabic was the official language (art. 2). Social solidarity was described as the foundation of national unity, while the family was the foundation of the society (art. 3). Some articles were also devoted to work, described as a right, a duty and an honour (art. 4), to the equality of all citizens before the law (art. 5) and to socialism, meant in its Arabic and Islamic sense, thus protecting private property (art. 6-8). Chapter II described the system of government: the Revolutionary Command Council constituted the supreme authority, and exercised the powers attached to national sovereignty, decided the general policies of the state, promulgated laws and decrees and made the necessary decisions to protect the revolution and its regime (art. 18-20).

However, despite the initial aim of the 1969 Constitutional Proclamation to draft a new constitution, between 1969 and 2011 there was no clear constitutional framework in Libya²⁶. Gaddafi envisaged a unique form of state: a third option between the capitalist democracy and the socialist Soviet state. In 1971 he held a speech where he stated that the country would move towards popular rule²⁷ but in the same year the Arab Socialist Union was created as a vanguard party to mobilize the masses and consolidate the revolution. However, since 1972 any political activity outside the Arab Socialist Union was prohibited²⁸ and since 1973 any reference to traditional democratic structures, such as the parliament and political parties, were considered a deceit for the population²⁹.

Then, in 1977 the Declaration on the Establishment of the Authority of the People was adopted³⁰. It was not a constitution *per se*, and it even did not aim at the drafting of a new one: the Quran was the constitution (art. 2). The Declaration was composed of only 10 articles that stated that the new official name of Libya was “The Socialist People’s Libyan Arab Jamahiriyya” (art. 1). Formally, the *jamahiriyya* (“republic of the masses”) was a new form of state where the people could directly rule through People’s Congresses, People’s Committees and Professional Unions (art. 3). At the top of this pyramid, there was the General Secretariat headed by Gaddafi.

²⁵ See *The Libyan Arab Republic Constitutional Proclamation of 1969*, <https://constitutionnet.org/vl/item/libyan-constitution-1969>.

²⁶ International Commission of Jurists, *The Draft Libyan Constitution: Procedural Deficiencies, Substantive Flaws*, 2015, 15.

²⁷ D. Vandewalle, *A History of Modern Libya*, cit., 81.

²⁸ *Idem*, 82.

²⁹ M. Campanini, *Storia del Medio Oriente contemporaneo*, Il Mulino, 2017, 147.

³⁰ See *Declaration on the Establishment of the Authority of the People of 1977*, <https://www.ilo.org/dyn/travail/docs/1528/cONSTITUTION.pdf>.

The ten articles enshrined the ideas that Gaddafi had included in the 1975 Green Book, which combined the theories of nationalism, Islam, socialism and populism³¹. Two years later, Gaddafi relinquished all his government positions but, practically, the country continued to be ruled by a small military *élite* headed by him, and the 1977 Declaration was supplemented by the Green Book. According to it, «the natural law of any society is either tradition (custom) or religion. Any other attempt to draft law for any society, outside these two sources, is invalid and illogical»³². This provision undermined the existing constitutional framework of Libya³³, so that the Green Book became the actual constitution: the creation of the *jamahiriyya* made the directives contained in the book the guiding legal norms³⁴. However, instead of realising a system of direct democracy, Gaddafi developed a totalitarian system based on the mobilization of the masses and controlled all aspects of Libyan politics without holding any formal office but with a powerful secret service and a system of mutual denunciation³⁵. However, this scheme did not manage to ensure its permanent existence. When the Arab Uprisings broke out, protests spread also in Libya.

3. The establishment of the National Transitional Council and the adoption of the 2011 Interim Constitutional Declaration

After the revolts broke out in Tunisia and Egypt, also the Libyans started protesting. The first uprising took place on 15th February 2011 in Benghazi where the security forces reacted aggressively³⁶. Then, protests spread throughout the eastern region and turned into a mass movement³⁷. On 27th February, the NTC established itself as a transitional government³⁸. However, since its origins, it experienced problems of reduced trust due to the lack of transparency in deciding its membership³⁹.

³¹ F. Cresti, M. Cricco, *Storia della Libia contemporanea*, Carocci, 2015, 229-231.

³² M. Al-Qadhafi, *Green Book*, Ithaca Press, 1999, 16.

³³ *The Draft Libyan Constitution: Procedural Deficiencies, Substantive Flaws*, cit., 15.

³⁴ D. Vandewalle, *A History of Modern Libya*, cit., 121.

³⁵ N. Schnelzer, *Libya in the Arab Spring. The Constitutional Discourse since the Fall of Gaddafi*, cit., 33. See also L. Anderson, *Muammar al-Qaddafi. The 'King' of Libya*, in *Journal of International Affairs*, No. 2, 2001.

³⁶ Protests broke out as a reaction to the arrest of Fathi Turbil, defence attorney of the victims of the massacre in the prison of Abu Salim. Thanks to the Internet, opposition movements in exile organised a “day of rage” with the organisers of the 15th February protest. As a result of the violent contraposition between the protesters and the police, there were 15 victims and hundreds of casualties. F. Cresti, M. Cricco, *Storia della Libia contemporanea*, cit., 275.

³⁷ K. Mezran, *The Libyan Conundrum*, in A.M. Morone, *Libya in Transition: Human Mobility, International Conflict and State Building*, in *Afriche e Orienti*, No. 3, 2018, 10.

³⁸ See S. Henneberg, *Managing Transition. The First Post-Uprising Phase in Tunisia and Libya*, Cambridge University Press, 2020, 102-106.

³⁹ K. Mezran, *The Libyan Conundrum*, cit., 10. The NTC was composed of the president and 30 other members (including five women). However, by 23rd March 2011, only the name of nine of them had been made public, officially to protect those who were in the territories still under the

The NTC came to exist in a tense time characterised by a strong international attention to Gaddafi's brutal repression. The UN Security Council (UNSC) adopted Resolution 1970 on 26th February 2011 that deplored the gross and systematic violations of human rights⁴⁰. Similarly, on 11th March, an extraordinary European Council issued a declaration expressing solidarity to the Libyan people, condemning the violent repression, welcoming the UNSC Resolution 1970 and stating that «Member States will examine all necessary options, provided that there is a demonstrable need, a clear legal basis and support from the region»⁴¹. In the next days, despite a more reluctant stance, the Arab League (AL) asked the UNSC to impose a no-flight zone, the African Union (AU) stressed the legitimacy of the Libya's people's aspiration to democracy and justice and the Secretary General of the Organisation of the Islamic Conference condemned the severe violations of human rights and international law in Libya⁴². Eventually, on 17th March 2011, the UNSC passed Resolution 1973 which established a no-flight zone and authorised the member states to take all necessary measures to protect civilians⁴³. Therefore, since mid-March 2011, a multi-state coalition led by NATO intervened in Libya⁴⁴, leaving an indelible mark on the following state-building and constitution-making process and changing the balance of power in favour of the opposition.

In this tense context, on 3rd August 2011, the members of the NTC adopted an Interim Constitutional Declaration that provided for a timetable for the formation of a new government and the constitution-making process⁴⁵. Like the constitutions of 1951, 1969 and 1971, it established an independent democratic state where the people were the source of authority. At the same time, it also reaffirmed – similarly to previous Libyan constitutions and to the ones of other Muslim-majority countries – that Islam was the religion of the state and the *shari'a* the principle source of legislation. However, it also guaranteed the freedom of practicing religious rights to non-Muslims and the respect of their personal status (art. 1)⁴⁶. In addition, while

control of pro-Gaddafi forces. Camera dei Deputati, Servizio Studi – Dipartimento Affari Esteri, *L'opposizione al regime libico*, in *Documentazione e ricerche*, No. 211, 23 March 2011, http://documenti.camera.it/leg16/dossier/Testi/es0728_0.htm.

⁴⁰ UNSC, *Resolution 1970 (2011)*, [https://www.undocs.org/S/RES/1970%20\(2011\)](https://www.undocs.org/S/RES/1970%20(2011)).

⁴¹ General Secretariat of the Council, *Extraordinary European Council 11th March 2011. Declaration*, April 2011, https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/119780.pdf.

⁴² Sénat, *Compte Rendu Intégral, Séance du mardi 22 mars 2011*, in *Journal Officiel de la République Française*, 2011, p. 2097.

⁴³ UNSC, *Resolution 1973 (2011)*.

⁴⁴ See R. Erdağ, *Libya in the Arab Spring. From Revolution to Insecurity*, Palgrave Macmillan, 2017, 30.

⁴⁵ See *Libya's Constitution of 2011*, https://www.constituteproject.org/constitution/Libya_2011.pdf.

⁴⁶ These elements show an evolution with respect to the 1977 Declaration and the 1969 Constitutional Declaration and even with respect to the 1951 Constitution. In fact, the ten articles of the 1977 Declaration simply specified that the Quran was the constitution of the state (art. 2) but did not devote any article to the protection of religious minorities. Similarly, art. 2 of the 1969 Constitutional Declaration recognised Islam as the official religion of the state but religious freedom

recognising Arabic as the official language, it also preserved «the linguistic and cultural rights of all components of the Libyan society»⁴⁷. This aspect is relevant because the three ethnic minorities – Amazigh, Tebu and Tuareg – demanded the recognition of their cultural and linguistic heritage and the end of their economic and social discrimination⁴⁸. After years of repression due to Gaddafi's Arabization policies, they contributed to the uprising and consequently asked for a recognition of their minority rights⁴⁹.

The Interim Constitutional Declaration also stated that the state should seek to establish a political democratic regime based upon a political multitude and a multi-party system (art. 4). Relating to the form of state during the transitional period, art. 16 and art. 30 established that the NTC was the authority in the state and was responsible for running the country until the election of the General National Congress. In fact, art. 30 represented the core of the roadmap towards the adoption of a new constitution and to the election of new legitimate national authorities⁵⁰. Initially, this pathway was respected but it proved troublesome since its beginning.

was guaranteed as long as it was in conformity with established customs. Differently, going back in time until the 1951 Constitution, art. 5 stated that Islam was the religion of the state but art. 11 established the equality of all Libyans before the law without distinction of – among others – religion. Moreover, art. 21 established the absolute freedom of conscience, so that «the State shall respect all religions and faiths and shall ensure to foreigners residing in its territory freedom of conscience and the right freely to practice religion so long as it is not a breach of public order and is not contrary to morality». *Libya's Constitution of 2011*, https://www.constituteproject.org/constitution/Libya_2011.pdf, art. 1.

⁴⁷ *Libya's Constitution of 2011*, cit., art. 1.

⁴⁸ N. Schnelzer, *Libya in the Arab Spring. The Constitutional Discourse since the Fall of Gaddafi*, cit., p. 84.

⁴⁹ See I. Kohl, *Libya's 'Major Minorities'. Berber, Tuareg and Tebu: Multiple Narratives of Citizenship, Language and Border Control*, in *Middle East Critique*, No. 4, 2014; C. Pagano, *Militanza amazigh e questione nazionale in Libia. La costruzione di un immaginario*, in *Zapruder. Storie in movimento*, No. 49, 2019, 99-101.

⁵⁰ According to art. 30, the NTC had to adopt the statute for the election of the GNC, appoint the High National Elections Commission (HNEC) and call the elections for the GNC. At the first sitting of the GNC, the NTC was to be dissolved and, within a delay of thirty days after its first meeting, the GNC had to designate the prime minister and choose a body for the formulation of a draft constitution that had to present the draft to the GNC sixty days after its first meeting. Then, the draft had to be approved by the GNC and submitted to referendum within thirty days of its adoption. The *quorum* in the referendum was of two thirds of the voters. After having obtained it, the committee had to certify the text of the new constitution that was to be promulgated by the GNC. In addition, the GNC also had to adopt an act on general elections within thirty days from the promulgation and those elections had to take place within 120 days after that. The HNEC had to organise the general election under the supervision of the national judiciary and the control of the UN and other international and regional organisations. Once the election results were certified by the GNC, the legislative power had to be invited to convene within 30 days and its first meeting had to mark the moment of the dissolution of the GNC.

So, several amendments were necessary due to pressures coming from the Islamist opposition⁵¹ and from Cyrenaica⁵².

Cyrenaica's continued pressure and threats to boycott the GNC elections compelled the NTC to modify the Interim Constitutional Declaration, so that the Constitution Drafting Assembly (CDA) would have been directly elected by the population instead of being appointed by the GNC. As this alteration was announced only two days before the GNC elections, any further debate on this issue was hampered⁵³.

In this first phase of post-Gaddafi's constitution-making, the process was mainly carried out at a national level both relating to the bodies involved and the stakeholders that intervened in the constitutional debate. At that time, the international actors that were particularly active in the military intervention did not seem to be equally involved also in constitution-making. It was only with the GNC election that a transnationalisation of the constitution-making began.

4. From a national to a transnational constitution-making: towards the Libyan Political Agreement

The GNC election of 7th July 2012 represented a fundamental step in the Libyan recent history of constitution-making, as it marked the beginning of a process of consultation with several international actors. The starting point was the deployment of an EU Election Assessment Team after an invitation by the High National Elections Commission (HNEC) to assess the conduct of the electoral process⁵⁴. Then, two months later, the Vice President of the GNC, Saleh Mohammed Almkhozom, asked for the support of the Venice Commission to draft a constitution for a new democratic Libya⁵⁵ and in November, a delegation held a meeting with the GNC. In addition, in order to support the reconciliation and the

⁵¹ In January 2012, a draft law for the election of the GNC was presented, but it stipulated a 10 percent quota for women, later abolished due to Islamist opposition. Islamists also pressured the NTC to abolish the ban on political parties based on religious or ethnic affiliation. N. Schnelzer, *Libya in the Arab Spring. The Constitutional Discourse since the Fall of Gaddafi*, cit., 57.

⁵² In March 2012, a Conference of the People of Cyrenaica saw the participation of politicians, civil society activists, tribal associations and representatives of the military. The conference was led by Ahmed al-Zubair al-Senussi, a descendant of Idris. They addressed the NTC and asked to introduce a federal system in Libya with equality of all regions and to modernise the 1951 Constitution as a new Libyan constitutional charter. The NTC met the call for equality of the three historical regions and modified the composition of the Constitution Drafting Assembly by deciding that it had to be composed of 20 members of each region elected by the GNC, despite disparities in the population. However, they did not convince the NTC to re-adopt the 1951 Constitution. N. Schnelzer, *Libya in the Arab Spring. The Constitutional Discourse since the Fall of Gaddafi*, cit., 73-74.

⁵³ *Idem*, 57.

⁵⁴ The team was independent from the member states, the EU Delegation to Libya and the European Commission. Election Assessment Team Libya 2012, *European Union Election Assessment Team to Thoroughly Assess National Election in Libya*, 22 June 2012, 1.

⁵⁵ Venice Commission, *Annual Report of Activities 2012, 2013*, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-RA\(2012\)001-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-RA(2012)001-e), 69.

post-conflict reconstruction, the EU organised a five-week Introduction Programme for 70 inexperienced newly elected members of the GNC between November and December 2012⁵⁶. Top-level European experts held training courses relating to the functions of a parliament and the constitutionalisation process⁵⁷.

Nevertheless, despite the elections were successful, fair and transparent and the positive sign of the invitation of the advisors of the Venice Commission and the EU, the enthusiasm for this moment of effective popular participation in Libyan politics was not long-lasting: insufficient institutional structures and internal dynamics, in a country that had experienced «Qadhafi's long process of deinstitutionalisation»⁵⁸, did not guarantee a smooth and peaceful transition. While the GNC proved to be very powerful in Libya's institutional design, its power stemmed from the alliance with militia groups that impacted on its capacity to negotiate and develop consensus⁵⁹. At the same time, the divisions that existed in the Libyan society were reflected also in the factions that soon emerged within the GNC and had repercussions on the whole constitution-making process. Namely, this was the case of the tensions with the ethnic minorities clearly analysed in the works of Sawani and Pack, Schnelzer, and Baldinetti⁶⁰.

For the purpose of this essay, it is worth mentioning that once the law for the direct election of the CDA was passed, it was strongly opposed by the ethnic communities Tebu, Amazigh and Tuareg. According to the electoral law, only six seats of the CDA – out of a total number of sixty – were reserved to these groups and divided among them⁶¹. The groups opposed such a low number, as it did not reflect their proportion in the population⁶², and demanded that the CDA decisions

⁵⁶ European Union, *EU support to the Libyan National General Congress: Induction Programme to the Benefit of the 200 Newly Elected Members Started in Tripoli on 7 November*, 9 November 2012, https://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/133396.pdf.

⁵⁷ *Ibidem*.

⁵⁸ Jebnoun pointed out that due to this process Libya emerged from the civil war without «a robust civil society, but with powerful and violent non-state actors». N. Jebnoun, *Beyond the Mayhem: Debating Key Dilemmas in Libya's Statebuilding*, in *The Journal of North African Studies*, No 5, 836.

⁵⁹ N. Schnelzer, *Libya in the Arab Spring. The Constitutional Discourse since the Fall of Gaddafi*, cit., 61-62; see also G. Joffé, *Can Libya Survive as a Single State?*, in *L'Année du Maghreb*, No. 21, 2019.

⁶⁰ See Y. Sawani, J. Pack, *Libyan Constitutionality and Sovereignty post-Qadhafi: the Islamist, Regionalist, and Amazigh Challenges*, cit.; N. Schnelzer, *Libya in the Arab Spring. The Constitutional Discourse since the Fall of Gaddafi*, cit.; A. Baldinetti, *Identità nazionale e riconoscimento delle minoranze in Libia: le richieste della società civile*, cit.

⁶¹ The Carter Center, *The 2014 Constitutional Drafting Assembly Elections in Libya – Final Report*, cit., 10.

⁶² Notably, this was the position of the Amazigh. According to unofficial estimates, they are about 10 percent of the Libyan population. K. Zurutuza, *Libya's Berbers fear Ethnic Conflict*, in *Al Jazeera*, 6 January 2015, <https://www.aljazeera.com/news/2015/1/6/libyas-berbers-fear-ethnic-conflict>; The Carter Center, *The 2014 Constitutional Drafting Assembly Elections in Libya – Final Report*, cit., 10.

on some issues⁶³ could be reached by consensus instead of by two-thirds majority⁶⁴. As they called for an amendment of the Constitutional Declaration but the GNC did not pass it, the Amazigh Supreme Council and the Tebu National Assembly announced the boycott⁶⁵. Eventually, the CDA elections of February 2014 were boycotted by the Amazigh⁶⁶. Initially, also the Tebu boycotted the elections, but they took part in the re-runs in April.

At that time, the political confrontation was not limited to the hall of the congress, but it was also played on the ground. The worsening of the security and political situation largely impacted on the constitution-building process, since it hampered the technical support of some external actors in the drafting process. For example, in January 2014, the president of the Venice Commission and two of its members had visited Tripoli after an invitation of the GNC⁶⁷. They had discussed with the Libyan authorities about the constitutional process and the possible cooperation on the drafting of the new constitution⁶⁸. The expertise of the Venice Commission could have had a strong impact on the constitution-building process and the future Libyan constitution, most probably characterised by a strong attention to the inclusion of norms relating to rule of law and human rights stemming from the Western liberal democratic TLO. However, the degradation of the security situation led to the temporary suspension of bilateral contacts, even if representatives of Libya participated in some multilateral activities of the Venice Commission⁶⁹.

Nevertheless, in this context the activities of local bodies continued. In February, a fifteen-member body with lawyers, academic and activists – the February Committee – was created to oversee the phasing out of the transitional legislature and develop an alternative legislative structure⁷⁰. It proposed a 200-member House of Representatives (HoR) in Benghazi. An amendment of the 2011 Interim Constitutional Declaration was approved to set up this new structure meant to replace the GNC⁷¹. Elections were held in June 2014, but some GNC members, backed by Salafists, did not concede the victory, claiming that the HoR was an illegitimate body⁷². So, due to security concerns the HoR had to move to the eastern

⁶³ Name of the state, identity of the state, flag and anthem, and language rights.

⁶⁴ *Idem*, 29.

⁶⁵ Relating to the case of the Amazigh, see C. Pagano, *Militanza amazigh e questione nazionale in Libia. La costruzione di un immaginario*, cit., 100-101.

⁶⁶ C. Pagano, *The Amazigh Issue in Post-Qadhdhāfi's Libya: Mobilizing History for Occupying a Political Vacuum*, in *Afriche e Orienti*, No. 3, 2018, 69-70.

⁶⁷ Venice Commission, *Annual Report of Activities 2014, 2015*, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-RA\(2014\)001-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-RA(2014)001-e), 67.

⁶⁸ *Ibidem*.

⁶⁹ *Idem*, 68.

⁷⁰ S. Ibrahim, *Caught between Law and Politics: Judicial Review of Constitutional Amendments in Libya*, in *ConstitutionNet*, 28 November 2014, <https://constitutionnet.org/news/caught-between-law-and-politics-judicial-review-constitutional-amendments-libya>.

⁷¹ *Ibidem*.

⁷² C. Sbailò, *Libia, la posta in gioco. Un compromesso costituzionale su un bicefalismo dell'esecutivo di tipo tunisino*, in *Federalismi*, 14 November 2018, 5-6.

city of Tobruk where it appointed General Khalifa Haftar to the role of commander of the Libyan National Army (LNA), the armed forces loyal to the HoR⁷³. Haftar conducted several offensives against Islamist groups in the eastern part of Libya and expanded his influence in Cyrenaica, so that the LNA started exerting *de facto* control of the region.

The deepening of the tensions among Libyan actors added an additional factor to the existing difficulties in adopting a new constitution. Thus, since then, a new phase of transnational participation in Libya's constitution-building began, marked by a more direct, but not necessarily more efficient, involvement of transnational actors, especially the UN. Until a meeting in Ghadames in September 2014, the approach of the international community to the Libyan transition had been quite passive⁷⁴. However, with the outbreak of the civil war, the UN became more actively involved in the transition.

The United Nations Support Mission in Libya (UNSMIL), that had been deployed in 2011, started conducting intensive negotiations to favour peace talks between the HoR and the GNC. The result was the 2015 Libyan Political Agreement (LPA)⁷⁵, also known as Skhirat Agreement. Signed on 17th December 2015, it was preceded by negotiations between several Libyan political actors, including militia leaders, so that it stated to be the result of a dialogue between key players in Libyan politics⁷⁶. Actually, it did not result from an effective Libyan participation in the drafting process. Despite previous talks, it was only UNSMIL which determined the content, so that it has been suggested that UN Special Representative (SRSG) Bernardino León Gross and his team «operated in a parallel reality to that of the Libyan reality on the ground»⁷⁷.

The LPA presented itself as a «unique opportunity to both address the immediate suffering of the Libyan people and build a democratic civil state through national consensus»⁷⁸. It enshrined four main principles: the assurance of the democratic rights for the population; the need for a consensual government based on the separation, oversight and balance of powers; the need to empower state institutions and the respect for the judiciary and its independence. The executive power was in the hands of a nine-member Presidential Council, which could reach decisions by a consensus of six. It was tasked to form a Government of National Accord (GNA)

⁷³ W. Morana, *The OSCE and the Libyan Crisis. Challenges and Opportunities for Comprehensive Security in the Mediterranean*, in *Security and Human Rights*, No. 30, 2019, 26.

⁷⁴ F.A. van Lier, *Constitution-Making as a Tool for State-Building? Insights From an Ethnographic Analysis of the Libyan Constitution-Making Process*, cit., 13.

⁷⁵ See *Libyan Political Agreement, 17 December 2015*, <https://unsmil.unmissions.org/libyan-political-agreement>.

⁷⁶ UNSMIL, *Libyan Political Agreement*, 17 December 2015, <https://unsmil.unmissions.org/libyan-political-agreement>.

⁷⁷ A. K. Maghur, *What Went Wrong With Leon's Libya Agreement?*, Atlantic Council, 24 November 2015, <https://www.atlanticcouncil.org/blogs/menasource/what-went-wrong-with-leon-s-libya-agreement/>.

⁷⁸ UNSMIL, *Libyan Political Agreement*, cit.

and an advisory High State Council (HSC) formed by former GNC members⁷⁹. The HoR remained the sole legislative authority.

Under the preamble of LPA, the agreement was responding to the need of legitimate state institutions and stressed the adherence to the Interim Constitutional Declaration. Most importantly, among the governing principles that had to invoke the implementation and interpretation of the agreement, point 4 stressed the «Commitment to the importance of drafting a permanent constitution for Libya that achieves the ambitions and aspirations of the Libyan people towards building the state of institutions based on the rule of law and respect of human rights»⁸⁰.

In fact, the LPA gave much attention to constitution-building, by devoting to it a section from article 47 to article 52. Under these articles, all parties had to commit themselves to the impartiality and independence of the CDA, whose security and financial and logistical support had to be guaranteed by the GNA, so that it could perform its duties and finalize a permanent constitution (art. 48-49). The parties called on the CDA to expedite the development and announcement of a roadmap with a clear timetable for the remaining phases of the process (art. 50). Upon the completion of the final draft, the CDA had to take the opinions of the HoR and the HSC (art. 51). Later, the draft constitution could be sent for referendum (art. 51). Finally, article 52 stated that the work of the CDA shall continue until 24th March 2016. If it was not able to conclude its activity by that date, a committee with five representatives of the HoR and five of the HSC with the participation of the Presidency Council had to be formed within two weeks to deliberate on this issue (art. 52).

Eventually, the LPA did not manage to carry out a proper stabilization of the country and to overcome divisions. The HoR was split between opponents and supporters of the accord and rejected it as product of Western pressure rather than the outcome of an inclusive dialogue⁸¹. Even if its legitimacy was reduced by this rejection, the LPA was applied with the installation of the Presidential Council and the GNA. Most importantly for the purpose of this essay, even if the LPA included a section on the pathway towards the adoption of the new Libyan constitution, its attention to the process was extremely superficial and did not make the international community positively impact on the constitution-making. Basically, the power to promote or hamper this process remained in the hands of local institution, namely the CDA, the body tasked with the drafting process. In this sense, the LPA could be seen as a sincere effort to boost the drafting process, based on a truly inclusive Libyan dialogue. All the more so, even if the following years represented a particularly active phase towards the adoption of a draft, the impossibility to

⁷⁹ M. Eljarh, *The Libyan Crisis: Internal Barriers to Conflict Resolution and the Role of Multilateral Cooperation*, in A. Dessì, E. Greco (eds.), *Search for Stability in Libya. OSCE's Role between Internal Obstacles and External Challenges*, Istituto Affari Internazionali, Edizioni Nuova Cultura, 2018, 55.

⁸⁰ *Libyan Political Agreement*, cit., 4.

⁸¹ W. Morana, *The OSCE and the Libyan Crisis. Challenges and Opportunities for Comprehensive Security in the Mediterranean*, cit., 27.

conclude the activities of the CDA by the date set in the LPA – 24th March 2016 – stress the distance between the agreement and the reality of the civil war.

5. Local tentative efforts: the Constitutional Drafting Assembly's draft constitutions of 2015, 2016 and 2017

While the UN was favouring the negotiations of the LPA, constitution-building efforts on behalf of the CDA did not stop. In December 2014, the CDA had published some proposals for different parts of the constitution⁸² that were later subject to debate and consultation with various stakeholders⁸³ and in June 2015, the assembly formed a Working Committee (WC) to prepare a new draft constitution. It was a twelve-member body whose representation was equally divided between the three historical regions but did not involve Tebu and Tuareg⁸⁴. Its working modalities were criticised as characterised by secrecy even with respect to the CDA members and as it did not take into account the chapters prepared by the Technical Committees of the CDA, therefore not considering the provisions on which there was already consensus⁸⁵.

The WC released a first draft in October 2015. It envisaged a stronger role for norms that may be considered to belong to the Islamic TLO: it proposed the establishment of a Council of Religious Scholars with fifteen experts chosen by the parliament to advise the authorities on religious aspects of public affairs, give advisory opinions based on *shari'a* and conduct religious enquiries to address current problems⁸⁶. The draft recognised the languages spoken by a part of the Libyans as national languages, while Arabic was the only official language⁸⁷. It established a semi-presidential system with a very strong executive and, relating to the debate on federalism, it recognised the principle of extended decentralisation

⁸² See J. Fedtke, *Analysis of the Draft Constitution of Libya Thematic Committees of the Constitution Drafting Assembly Status: December 2014*, International IDEA, 2015.

⁸³ *The Draft Libyan Constitution: Procedural Deficiencies, Substantive Flaws*, cit., 14. In fact, in 2014, the CDA had held several public meetings to explain the drafting process to the population, which included meetings in townhalls and attempts to reach out to specific groups, such as women. Actually, those meetings were criticised by some civil society organisations because they were advertised with a limited advance, they were often attended only by tribal leaders and senior members of the society, they resembled more to a lecture than a debate and they were not held in some parts of Libya due to security reasons. Different groups submitted recommendations to the CDA, but the results were disappointing: few suggestions were reflected in the December 2014 Proposals. *Idem*, 19-20.

⁸⁴ S. Ibrahim, *Libya's Long Awaited Constitution: Will it Finally See the Light of the Day?*, in *ConstitutionNet*, 22 March 2016, <https://constitutionnet.org/news/libyas-long-awaited-constitution-will-it-finally-see-light-day>.

⁸⁵ *Ibidem*.

⁸⁶ See *The Draft Libyan Constitution: Procedural Deficiencies, Substantive Flaws*, cit.; S. Ibrahim, *Libya's Long Awaited Constitution: Will it Finally See the Light of the Day?*, cit.

⁸⁷ *Ibidem*.

composed of municipalities and provinces. However, the central authorities could exercise great powers over these entities⁸⁸.

The October draft was criticised both by UNSMIL, due to provisions in contrast with international standards, and the CDA. So, the WC published a new draft a few months later. The February draft largely retained the provisions relating to *shari'a*, but replaced the Council of Religious Scholars with a Council for Religious Research with fewer powers and an advisory nature⁸⁹. In addition, the new draft included some relevant provisions for the rights of women, who had to be guaranteed equal rights as men and who could run for the presidency of the Republic and other offices⁹⁰. Relating to the system of government, the draft constitution still envisaged an extended decentralization with a three-tier decentralized multi-order governance⁹¹.

Even if the February draft tried to address the criticisms of the October draft⁹², the CDA met on 23rd February 2016 but did not reach the necessary *quorum*. In such a tense situation characterised by evident rifts within the CDA, the UN oversaw subsequent CDA negotiations in Salalah (Oman) in March 2016 that resulted in a slightly amended draft⁹³. The new draft further worsened tensions within the CDA and was eventually annulled by the administrative appeals court in Beida. Thus, the 24th March 2016 deadline established by the LPA was not met⁹⁴. However, an important result was obtained the following year.

2017 was crucial in the constitution-making process. The CDA approved a new draft constitution on 29th July 2017⁹⁵ without any broad involvement of the population or public debate. However, two thirds of the members of the CDA approved it, giving for a while a new life to the transition process⁹⁶.

The draft established a republic with a semi-presidential system of government and a bicameral parliament – the Shura Council – composed of the HoR and the Senate (art. 67) and envisaged a system of local governance that had to be based on the principle of expanded decentralization (art. 143)⁹⁷. The draft provided for three

⁸⁸ *Ibidem*.

⁸⁹ *Ibidem*.

⁹⁰ *Ibidem*.

⁹¹ Democracy Reporting International, *The New Vision of Local Governance in Libya by the Draft Constitution of 3 February 2016*, Briefing Paper 65, March 2016, http://democracy-reporting.org/wp-content/uploads/2016/05/dri_ly_bp_65_local_governance__3__1_.pdf, p. 1.

⁹² *Ibidem*.

⁹³ F.A. van Lier, *Constitution-Making as a Tool for State-Building? Insights From an Ethnographic Analysis of the Libyan Constitution-Making Process*, cit., 15.

⁹⁴ Abed, *News Roundup – Wed, Dec 07, 2016*, in *The Libya Observer*, 7 December 2016, <https://www.libyaobserver.ly/inbrief/news-roundup-wed-dec-07-2016>.

⁹⁵ M. Toaldo, *A Constitutional Panacea for Libya?*, Carnegie Endowment for International Peace, 22 August 2017, <https://carnegieendowment.org/sada/72878>.

⁹⁶ Z. Al-Ali, *Libya's Final Draft Constitution: A Contextual Analysis*, International IDEA, <https://constitutionnet.org/sites/default/files/201710/Analysis%20of%20Libya%27s%20final%20draft%20constitution%20-%20Zaid%20Al-Ali.pdf>, 2.

⁹⁷ *Libya Constitution, Final Draft 2017*, <https://www.temehu.com/CDA/final-draft-libya-constitution-29-july-2017-english-translation.pdf>.

levels of government – the central government in Tripoli, the governorates and the municipalities (art. 144) – but the decisions on how local government had to enjoy autonomous, transferrable and shared powers from and with the central authority were not specified but needed to be in accordance with law⁹⁸. Finally, Chapter II enshrined the most common rights and freedoms protected by international human rights treaties and, interestingly, concerning the debate on ethnic minorities, article 55 stated that the state should guarantee the protection of Libyan languages and the protection and promotion of local cultures, heritage, traditional knowledge, literature and art.

There was some debate relating to the legality of the CDA vote in favour of the final version of the draft, as it had been claimed that the CDA did not properly follow its own rules when it voted⁹⁹. However, the session was not repeated, and it was decided that the draft had been approved, causing the reaction of two Tebu representatives who announced their rejection of the document because it did not grant sufficient rights to the ethnic minorities. This reaction was relevant, as the draft constitution both needed the two-thirds majority of the CDA and the approval by one each of the two Tebu and two Tuareg members. Despite this opposition, the CDA asked the HNEC to prepare for a referendum, that theoretically was supposed to happen within 30 days after the CDA formally proposing a constitution¹⁰⁰.

However, the first obstacles started emerging when the HNEC noted that it would need the HoR to pass a law in order to go ahead with the poll¹⁰¹. Moreover, the Beida court ruled the suspension of the bill, preventing the HoR to vote on the constitution, and only in February 2018 the Supreme Court of Tripoli overturned the judgement, paving the way for the referendum¹⁰². Finally, in November 2018, the HoR passed the Constitution Referendum Law, amended the 2011 Constitutional Declaration and divided Libya into three voting regions: Tripolitania, Cyrenaica and Fezzan. Each region had to vote in favour of the draft constitution with a simple majority, but a two-thirds majority was necessary at the national level. The HoR also issued Law No. 6, which tasked the HNEC with conducting a referendum on the 2017 draft¹⁰³. However, the referendum has not taken place yet.

6. From 2017 to present: a new phase of transnational constitution-making

⁹⁸ Z. Al-Ali, *Libya's Final Draft Constitution: A Contextual Analysis*, cit., 12.

⁹⁹ *CDA Calls on Election Commission to Prepare Referendum on Draft Constitution as Tebu Representatives Reject it*, in *Libya Herald*, 31 July 2017, <https://www.libyaherald.com/2017/07/31/cda-calls-on-election-commission-to-preparereferendum-on-draft-constitution-as-tebu-representatives-reject-it/>.

¹⁰⁰ *Ibidem*.

¹⁰¹ *Ibidem*.

¹⁰² K. Mahmoud, *Libya: MPs Refuse to Recognize the Constitution Drafting Assembly*, in *Asharq al-Awsat*, 21 February 2018, <https://english.aawsat.com/home/article/1182411/libya-mps-refuse-recognize-constitution-drafting-assembly>.

¹⁰³ Bertelsmann Stiftung, *Libya Country Report 2020*, <https://www.bti-project.org/en/reports/country-report-LBY-2020.html>.

Even if at the beginning of 2017, the UN-led political process seemed to be overcome by a parallel process led by the UAE with the collaboration of Russia and Egypt¹⁰⁴, by June the UN took again the lead of the peace negotiations with the new SRSG, Ghassan Salamé¹⁰⁵. In September 2017, he presented an Action Plan, stressing the attention towards the participation of Libyan citizens in its development¹⁰⁶. It was to be composed of four different phases: first, the amendment of the LPA; second, the opening of a National Conference under the auspices of the UN Secretary General to include those players which had been reluctant to join the political process, bringing together the members of the HoR, of the HSC and many others not represented in those bodies; third, a parallel work of the HoR and the CDA, so that the HoR prioritized the legislation for presidential and parliamentary elections and the constitutional referendum, and the CDA reviewed the draft constitution; fourth, the end of this process within one year with the referendum to adopt the new constitution and then the election of a president and a parliament¹⁰⁷.

As the Action Plan was implemented only partially, in February 2018, Salamé asked the Centre for Humanitarian Dialogue (HD) to run consultations among the Libyans in order to clarify the strategy and the objectives of the National Conference and to give the opportunity to all Libyans to contribute to its conclusions¹⁰⁸. This represented another fundamental step in the transnationalisation of the constitution-making process, as a Swiss-based private diplomacy organization was involved in the consultation promoted by the UN. Differently from the LPA and the Action Plan, which were simply providing for a general roadmap for the Libyan institutions, the involvement of the HD represented an effort to find some elements of consensus in Libya's fragmented political landscape.

The consultation phase ran from April to July 2018. The final report of the HD¹⁰⁹ stated that the consultative process was composed of 77 separate meetings, more than 7,000 Libyans of different social extraction participated and a quarter of them were women. Citizens could also participate via an online platform, so that the overall total participation was of 1.8 million Libyans. In addition, also local media outlets played a role in covering the meetings and produced reports summarising

¹⁰⁴ See A. Mattiello (a cura di), *Verso una nuova Roadmap della Libia?*, Senato della Repubblica, Servizio Affari Internazionali, 12 November 2018, <http://www.senato.it/service/PDF/PDFS/erver/BGT/01081241.pdf>.

¹⁰⁵ *Ibidem*.

¹⁰⁶ He stated: «This Action Plan for Libya was not designed by me, but by the Libyan people who I crossed in towns, cities and countries to speak to. It is, in essence, a synthesis of their hopes and goals». UNSMIL, *Remarks of SRSG Salamé at the High-Level Event on Libya*, 20 September, 2017, <https://unsmil.unmissions.org/remarks-srsg-salam%C3%A9-high-level-event-libya>.

¹⁰⁷ *Ibidem*.

¹⁰⁸ Centre for Humanitarian Dialogue, *The Libyan National Conference Process. Final Report*, November 2018, 8.

¹⁰⁹ *Ibidem*.

the recommendations. The role of the HD was relevant as it worked with the organisers, was present at each event and made all efforts to ensure that the process was inclusive.

Relating to the constitution-making process, the results of the consultation showed that there was consensus on the need to end the transitional phase, even if few participants were optimistic that a new constitution or elections could solve deep-seated problems. In addition, the report included some results that clearly reflected the Libyans' will that the next constitution would reflect traditional practices, values and public conscience, irrespective of foreign interference. It was at this point that the necessity to include norms that may not belong to the Western TLO or that may even be deemed in contrast with it emerged as a precondition not to question the charter's legitimacy. In addition, further stressing the necessity to have a Libyan-led process, the interviewees largely answered that a referendum had to be held on the draft constitution.

This promising consultation notwithstanding, foreign actors continued to be central in promoting constitution-making but they remained quite detached from the Libyan population. In the last years, European leaders organised several conferences aimed at Libya's stabilization that included sections devoted to constitution-making. The first one was held in Paris on 28th May 2018, where the French president Macron hosted the leaders of Libya's main factions and the representatives from 20 states and international organisations to establish a roadmap to end political instability¹¹⁰. The parties agreed on the urgency to adopt a constitution as the first point of the principles to stabilize Libya and on the necessity to formulate an electoral framework by 16th September, to hold parliamentary and presidential elections on 10th December and to promote unity among the several Libyan financial and security bodies¹¹¹. However, the distance between the Paris conclusions and the reality on the ground was broad. Holding free and fair elections was difficult due to the lack of a unified security apparatus and the existence of several local militias¹¹², so that both the general elections and the constitutional referendum were postponed until at least 2019 due to continued instability¹¹³.

In order to overcome the stalemate, Salamé proposed a revised Action Plan. Under this new plan, the National Conference was tasked to define its own vision on Libya's transition and to settle – once again – a roadmap¹¹⁴. On 9th November 2018, Salamé announced that the «Libyan-led and Libyan-owned» National

¹¹⁰ See S. Haddad, *Dialogues, ambiguïtés et impasses libyennes*, in *L'Année du Maghreb*, No, 19, 2018; F. Saini Fasanotti, A. Varvelli, *Libia: l'anno di Haftar?*, Istituto per gli Studi di Politica Internazionale, 27 December 2018, <https://www.ispionline.it/it/pubblicazione/libia-lanno-di-haftar-21870>.

¹¹¹ *Ibidem*.

¹¹² A. Al-Shadeedi, *Are the Next Libyan Elections Doomed to Fail?*, Clingendael, 14 June 2018, <https://www.clingendael.org/publication/are-next-libyan-elections-doomed-fail>.

¹¹³ Bertelsmann Stiftung, *Libya Country Report 2020*, cit.

¹¹⁴ A. Mattiello (a cura di), *Verso una nuova Roadmap della Libia?*, cit., 4.

Conference had to start its activities in the first weeks of 2019¹¹⁵, providing a platform for speech for the Libyan people, including tribes and militias¹¹⁶.

This objective was also shared by the participants of the Palermo Conference (12th-13th November 2018) in an attempt of the Italian government to counter the Paris summit¹¹⁷. The conference joined together both Libyan delegations and representatives of several countries and international organizations. The participants welcomed Salamé's call for a Libyan-led inclusive National Conference as an opportunity to forego the use of force to settle their disputes, to adopt principles and a timeline for the unification of their institutions and commit to the democratic renewal of their elected bodies¹¹⁸. In addition, they underlined the importance of concluding the subsequent constitutional framework and electoral process by spring 2019, but also this project failed.

In September 2019, an additional process of consultation was initiated by Salamé and the German government. It resulted in the Berlin International Conference on Libya on 19th January 2020. As in Paris and Palermo, a number of countries and international organisations convened in Berlin. The main objective was «to forge a consensus» on the Libyan crisis and to pave the way for «an international umbrella to protect intra-Libyan discussions over the future of the country»¹¹⁹. The conclusions recognised the central role of international organisations in Libya's stabilisation¹²⁰. The parties supported the LPA as a viable framework for the political solution and called for the establishment of a functioning Presidency Council and a single, unified, inclusive and effective government approved by the HoR. They urged Libyan parties to resume an inclusive Libyan-led and Libyan-owned political process under the auspices of UNSMIL with the participation of women and youth, and called on international actors to act against Libyan spoilers of the political process¹²¹. The Berlin Conference also created an International

¹¹⁵ UNSMIL, *Remarks of SRSG Ghassan Salamé to the United Nations Security Council on the Situation in Libya*, 9 November 2018, <https://unsmil.unmissions.org/remarks-srsg-ghassan-salam%C3%A9-united-nations-security-council-situation-libya>.

¹¹⁶ A. Mattiello (a cura di), *Verso una nuova Roadmap della Libia?*, cit., 4.

¹¹⁷ K. Mezran, E. A. Neale, *Libya, the US, and the Palermo Conference*, Atlantic Council, 9 November 2018, <https://www.atlanticcouncil.org/blogs/new-atlanticist/libya-the-us-and-the-palermo-conference/>.

¹¹⁸ *Conclusions*, Palermo Conference for and with Libya, 12/13 November 2018, http://www.governo.it/sites/governo.it/files/conference_for_libia_conclusions_0.pdf, 1-2.

¹¹⁹ UNSMIL, *Berlin International Conference on Libya*, 19 January 2020, <https://unsmil.unmissions.org/berlin-international-conference-libya-19-january-2020>.

¹²⁰ In particular, it talked about «the central role of the UN to facilitate intra-Libyan political and reconciliation process [...] as well as the important roles of the African Union and its High Level Committee of the Heads of State and Government on Libya, the League of Arab States, the European Union and the neighboring countries in Libya's stabilization» and «all these International Organisations will closely work together». Bundesregierung, *The Berlin Conference on Libya. Conference Conclusions, Press release 31*, 19 January 2020, <https://www.bundesregierung.de/breg-en/news/the-berlin-conference-on-libya-1713882>.

¹²¹ *Ibidem*.

Follow-Up Committee including all countries and international organisations that participated in the conference to maintain coordination among the actors¹²².

Basing on UNSC Resolution 2510 (2020) that endorsed the conclusions of the Berlin Conference, UNSMIL facilitated the first round of the Libyan Political Dialogue Forum from 7th to 15th November 2020 in Tunisi¹²³. The LPDF reunited 75 participants, both women and men, representing the full social and political spectrum of Libya's society¹²⁴. The talks were facilitated by the Acting SRSG for Libya and head of UNSMIL, Stephanie Williams, with the support of UNSMIL and a team of the HD. At the end, the participants agreed on a roadmap to the elections, to be held on 24th December 2021, the 70th anniversary of Libya's independence.

The elections are currently at the heart of the debate as they would mark a fundamental step towards the stabilization of the country and the adoption of a permanent constitution. On 19th and 20th January 2021, the Constitutional Committee formed by the HoR and the HSC held a meeting in Hurghada (Egypt) and agreed to hold a constitutional referendum on the proposal drafted by the CDA before the general elections of 24th December¹²⁵. Further discussions, brokered by UNSMIL, were held in February to reach an agreement on the date of the referendum¹²⁶ but no official date is currently available.

In the meanwhile, the UN-led LPDF appointed an *interim* government with Mohammed al-Menfi as head of the Presidency Council and Abdulhamid Dbeibeh as prime minister. The aim of this administration is to end the division of Libya in the path towards the national elections¹²⁷. In this occasion, the CDA asked UNSMIL not to put the constitutional draft up for discussion: half of the members argued that neither UNSMIL nor any other current political body had the right to reject or approve the constitution, a power that belongs exclusively to Libyans¹²⁸.

Today, on 9th March 2021, an official date for the constitutional referendum has not been set yet.

7. Conclusion

¹²² *Ibidem*.

¹²³ UNSMIL, *Libyan Political Dialogue Forum*, <https://unsmil.unmissions.org/libyan-political-dialogue-forum>.

¹²⁴ *Ibidem*.

¹²⁵ UNSMIL, *UNSMIL Welcomes the Meeting of the Constitutional Committee in Hurghada*, 20 January 2021, <https://unsmil.unmissions.org/unsmil-welcomes-meeting-constitutional-committee-hurghada>.

¹²⁶ S. Zaptia, *HoR-HSC Joint Constitutional Committee Hold Third Hurghada Meeting*, in *Libya Herald*, 9 February 2021, <https://www.libyaherald.com/2021/02/09/hor-hsc-joint-constitutional-committee-hold-third-hurghada-meeting/>.

¹²⁷ *UN-led Libya Forum Selects New Interim Government*, in *Al Jazeera*, February 2021, <https://www.aljazeera.com/news/2021/2/5/libyas-factions-head-into-runoff-on-interim-government>.

¹²⁸ J. Jawhar, *Libya's CDA Warns against Discussing Draft Constitution in Geneva*, in *Asharq Al-Awsat*, 12 February 2020, <https://english.aawsat.com/home/article/2127546/libya%e2%80%99s-cda-warns-against-discussing-draft-constitution-geneva>.

Libya's constitution-making is still in progress. Its future is uncertain, as a date for the constitutional referendum has not been set yet. There are some hopes that it will take place before the general elections in December 2021 and so Libya will finally adopt a new permanent constitution after years of instability. If the process proves successful, the 2017 Draft will become Libya's permanent constitution. Nevertheless, the success of the process is not indisputable. Libya's last decade has been marked by the development of several roadmaps that were not put into practice and up to now, the 2011 Interim Constitutional Declaration is still in force. However, Libya's constitution-making has evolved over the last decade. The Interim Constitutional Declaration was the result of an exclusively intra-Libyan effort to establish a provisional framework in the transitional phase. Later, the drafting process proved to be extremely challenging and the involvement of transnational actors became inevitable, even if it was stronger in some periods than in some other moments.

Some aspects of the ongoing transnational constitution-making are worth mentioning. First, the fact that constitution-making has not been limited to Libyan actors is not new: the drafting of 1951 Constitution was marked by the UN. Today the UN is still the leading external actor in the process, but other international organisations – the EU, the AU and the AL – have played an ancillary role in participating in UN-led conferences and supporting their conclusions. The EU, strongly interested in a stabilisation of the southern Mediterranean basin, has also been involved but it seems that its action has been additional to the one of the UN.

Second, organisations specifically devoted to democracy and constitutional assistance have been working behind the scenes but have contributed to the process. The Venice Commission was initially involved, but after 2014 its visits were hampered by degrading security conditions. However, it has continued playing an advisory role when its contribution has been requested. The participation of a private diplomacy organisation, the HD, in the 2018 consultative process should also be acknowledge.

However, also Libyan bodies have been central in both promoting and hampering the process. Definitely, if the 2017 Draft will be adopted, it will be the result of an intra-Libyan acceptance of the externally promoted constitution-making process. Libya's centrality is clear also in the norms of the 2017 Draft Constitution. While elements of the Western liberal TLO are encapsulated in the charter, especially concerning rights and freedoms, some typically Islamic elements persist. For example, Islam is the religion of the State, *shari'a* the source of legislation and a Shari'a Research Council shall be established. Hence, in Libya two TLOs may interfere. This might seem paradoxical because of the apparent inconsistency of constitutionalism and certain aspects of *shari'a*. However, they could be compatible depending on the interpretation of Islamic law¹²⁹. In fact, elements of an Islamic

¹²⁹ A.A. An-Na'im, *The Legitimacy of Constitution-Making Processes in the Arab World*, in R. Grote, T.J. Röder (eds.), *Constitutionalism, Human Rights, and Islam after the Arab Spring*, Oxford University Press, 2016, 38.

TLO are necessary as the constitution needs what An-Na'im defined as «Islamic legitimacy», that is

taking local Islamic concerns and discourse into consideration in assessing the substantive and procedural legitimacy of the constitution-making process in any country. This does not mean that there is some specific "Islamic" criterion of legitimacy to be applied, as there are too many competing interpretations of Islam for there to be agreement on that. Rather, the point here is that the criterion for assessing legitimacy should be internal to each society, and should include Islam or other religions adhered to by significant segments of the population¹³⁰.

To conclude, Libya's draft constitution results in a combination of norms originating in these TLOs, reinforcing, on the one hand, the legitimacy before international organisations and Western states involved in Libya's constitution-making, and, on the other hand, the "Islamic legitimacy" before the majority of the population. Only the referendum, the adoption of a permanent constitution and its implementation will allow to assess whether the combination of national and transnational actors and of the Western and the Islamic TLOs proved successful.

¹³⁰ *Idem*, 35.